6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[FRL-]

RIN 2060-AE78

National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; clarifications and correction.

SUMMARY: On April 5, 2002, the EPA issued a direct final rule to amend the national emission standards for hazardous air pollutants for the portland cement industry. That action, in part, amended the monitoring requirements for the industry. This action corrects the corresponding table of monitoring requirements in the final rule and clarifies two issues arising from explanatory language in the preamble to the direct final rule amendments of April 5, 2002.

Section 553 of the Administrative Procedure Act, 5 U.S. C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public comment procedures are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making this rule final without prior notice and comment procedure because it

merely corrects a summary table to reflect amended monitoring requirements and clarifies preamble language from the direct final rule amendments. Both the proposed rule and direct final rule amendments (as well as the Settlement Agreement that occasioned these amendments) were subject to exhaustive notice and comment (including comment on the matters addressed in this notice). Thus, notice and comment are contrary to the public interest and unnecessary. We find that the circumstances described constitute good cause under 5 U.S.C. 553(b)(3)(B) and 553(d)(3) which authorizes an agency to make a rule immediately effective where it finds that there is good cause for doing so.

EFFECTIVE DATE: [INSERT DATE OF PUBLICATION OF THIS FINAL RULE IN THE FEDERAL REGISTER].

ADDRESSES: Docket number A-92-53, containing supporting information used in the development of this notice is available for public inspection and copying between 8:00 a.m. and 5:30 p.m., Monday through Friday (except for Federal holidays) at the following address: U.S. Environmental Protection Agency, Air and Radiation Docket and Information Center (6102), 401 M Street, SW, Washington, DC 20460, or by calling (202) 260-7548. A reasonable fee may be charged for copying docket materials.

Effective August 27, 2002, the Office of Air and

Radiation Docket and Information Center will have a new address: 1301 Constitution Avenue, NW, Room B108, Washington, DC, 20460.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Wood, P.E., Minerals and Inorganic Chemicals Group, Emission Standards Division (C504-05), Office of Air Quality Planning and Standards, U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5446, facsimile number (919) 541-5600, electronic mail address: wood.joe@epa.gov.

SUPPLEMENTARY INFORMATION:

Docket. The docket is an organized and complete file of all the information considered by EPA in the development of this direct final rule. The docket is a dynamic file because material is added throughout the rulemaking process. The docketing system is intended to allow members of the public and industries involved to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the proposed and promulgated rules and their preambles, the contents of the docket will serve as the record in the case of judicial review. The docket number for this rulemaking is A-92-53.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of this action will also be available through the WWW. Following signature, a copy of

this action will be posted on EPA's Technology Transfer Network (TTN) policy and guidance page for newly proposed or promulgated rules: http://www.epa.gov/ttn/oarpg. The TTN at EPA's web site provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541-5384.

Regulated Entities. Entities potentially regulated by this action are those that manufacture portland cement. Regulated categories and entities include:

Category	NAICS	SIC	Examples of regulated entities
Industry	32731	3241	Owners or operators of portland cement manufacturing plants.
State	32731	3241	Owners or operators of portland cement manufacturing plants.
Tribal associations	32731	3241	Owners or operators of portland cement manufacturing plants.
Federal agencies	None	None	None.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that the EPA is now aware could potentially be regulated by this action. To determine whether your

facility, company, business organization, etc., is regulated by this action, you should carefully examine the applicability criteria in §63.1340 of the rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding FOR FURTHER INFORMATION CONTACT section.

Background. On June 14, 1999, we published in the Federal Register the final rule entitled, "National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry" (40 CFR part 63, subpart LLL). The American Portland Cement Alliance (APCA) petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the final rule under section 307(b)(1) of the Clean Air Act (CAA). The APCA and the EPA negotiated and agreed to the terms of a Settlement Agreement and its implementation. As agreed to under the terms of the Settlement Agreement, EPA issued direct final amendments (67 FR 16614, April 5, 2002) to improve implementation of the rule primarily in areas of applicability, emissions testing, and monitoring (there were no amendments to the emission standards themselves). After publication of the direct final rule amendments, commenters requested a correction to the rule and clarification of preamble language to better reflect provisions in the

Settlement Agreement and to avoid regulatory misinterpretations. In response to these comments, we are issuing the final rule amendments.

Kiln Production Rate Not an Operating Limit. In the preamble to the April 5, 2002, direct final amendments, we explained why we amended §63.1349(b) to require that performance testing be conducted under representative conditions rather than under "the highest load or capacity reasonably expected to occur" (67 FR 16616). We stated, "If the kiln is operated under a condition not representative of the condition during the performance test, e.g., the kiln is operated at a production rate higher than the production rate at which it was tested, the performance test will need to be re-conducted and temperature limit(s) reestablished." Although we did not receive any comments on the amended regulatory text, "...when the affected source is operating at the representative performance conditions in accordance with §63.7(e)" (67 FR 16619), we did receive comments addressing specifically the example we gave of a supposedly unrepresentative condition, which they felt conflicted with the intent of the regulatory amendment. Our intent was to make the rule more consistent with the General Provisions language that performance tests be conducted under representative conditions and to provide guidance on the

representativeness of a particular operating condition. Today, we are clarifying that if a source operates at a higher production level than that at which it tested, the previous performance test *may* not have been representative of operating conditions and emissions at that higher production level. Whether the test was representative depends on how much higher actual production levels are than those that existed during the performance test and on other factors affecting the effectiveness of the pollution control equipment; the ultimate measure being whether any of these changes may adversely affect compliance with the emission standards. The production rate of a kiln is only one of many indicators (i.e., potentially relevant indicia) of representative operating conditions. In addition, the production rate may be temporarily and slightly higher than the rate at which the kiln was operating during a performance test and still be representative. A source is not automatically required to conduct a performance test if the source's operating conditions vary from those in place during the most recent prior performance test. However, the burden is on the source to demonstrate that it is able to comply with the emission limits when operating under the alternative operating conditions. That is, it is the source's ultimate burden of persuasion to demonstrate that

its performance testing conditions remain representative. This is in accordance with the general principle that the party claiming an exception to an established protective rule has the burden of justifying that exception. See Beth Israel Hospital v. NLRB, 437 U.S. 482, 493, 502 (1978); see also Hazardous Waste Treatment Council v. EPA, 886 F. 2d 355, 366-67 (D.C. Cir. 1989) (permissible for agency to assign ultimate burden of persuasion).

Both commenters stated that the example we gave suggests that production limits are established by the performance test, and that this conflicts with the Settlement Agreement and our letter to the APCA (April 17, 2002), where we explicitly stated that the production rate is not an operating limit. The example in the preamble does not, however, impose a production limit or establish the production rate as an operating limit. We are clarifying and reiterating language from the Settlement Agreement and from our letter to APCA that the production rate is not a parameter for which operating limits are established, and the production rate measured during dioxin/furan (D/F) or particulate matter (PM) performance test is not an operating limit for the source. Section 63.1344 of the rule lists all of the operating limits that kilns are subject to as part of the requirements of the NESHAP. Those operating limits

relate to the D/F emission standards and include only temperature limits and limits pertaining to the use of activated carbon injection. Section 63.1344 makes no mention of a kiln's production rate as an operating limit, and indeed this was our intent in drafting the final rule. This means that if the kiln production rate exceeds the production rate during the previous performance test, it is not in violation of any operating parameter requirement. This does not mean, however, that a change in production rate (or change in any other operating practice which is not a parametric monitoring requirement established in the rule) is irrelevant in determining whether the kiln is operating in compliance with the emission limit.

One of the commenters stated that the aforementioned example in the April 5, 2002, preamble conflicts with §63.1349(e)(1) and (2) of the newly amended rule which state that if a source plans to undertake a change in operations that may adversely affect compliance with an applicable D/F or PM standard, the source must conduct a new performance test. As such, the facility would only be required to re-conduct the performance test if it determines that an increase in the production rate may adversely affect compliance (and, of course, that this determination is correct).

We are clarifying today that a source would need to re-conduct a performance test if the current operation is not representative of the operation during the previous performance test such that the change in operation may adversely affect compliance. As discussed above, production rate levels that are only slightly higher than the production rate levels achieved during the previous performance test may not adversely affect compliance, and therefore, may still be representative. Although increased production rates would tend to increase exhaust gas stream flow rates and, therefore, potentially diminish control device effectiveness, there are other factors which may be more important in controlling emissions and determining whether compliance is adversely affected. For example, temperature of the exhaust gas plays an important role in D/F formation and for this reason, the rule requires the source to establish temperature operating limits. Regarding the PM emission limit, although the mass emission rate of PM may increase with an increase in production rate, compliance may not necessarily be adversely affected since the format of the standard is in pounds of PM per ton of dry feed, and an increase in production rate would allow for some increase in the mass emission rate of PM. However, as stated above, the burden is on the source to demonstrate

that they are able to comply with the emission limits when operating under conditions which vary from those in place during the most recent prior performance test.

In summary, there is no operating limit associated with the production rate. Further, the example we gave in the April 5, 2002, preamble wasn't meant to create the presumption that an increase in production rate beyond the production rate during the previous performance test automatically means that the kiln must be retested. Production rate could be relevant in determining representativeness of the original test, but in some cases, an increase may not adversely affect emissions, and the effect of other operating factors (such as exhaust gas stream temperature) should not be discounted since they may often affect emissions more. Although the source has to show that it was tested under representative conditions, we expect that there are situations where a source can show that an increase in the production rate does not adversely affect compliance.

Only Transfer Points Used to Convey Coal from the Mill to the Kiln are Potential Affected Sources. This issue concerns the interface between the new source performance standards (NSPS) for coal preparation plants (40 CFR part 60, subpart Y) and the portland cement NESHAP (40 CFR part

63, subpart LLL). The direct final amendments correctly revise §63.1356 of the final rule to clarify that the systems used to convey and transfer coal from the coal mill to the kiln at portland cement plants that are major sources of hazardous air pollutants are not subject to the NSPS for coal preparation plants. However, the industry trade association believes the April 5, 2002, preamble language confuses the issue. In response, we clearly state that the *only* subpart Y sources potentially subject to subpart LLL requirements at major sources are the transfer points used to convey coal from the mill to the kiln. Other subpart Y transfer points (such as those transferring coal from a barge to a coal pile) would continue to be subject to subpart Y requirements, as appropriate.

Monitoring Requirements for Raw Mills and Finish Mills (Table 1 to §63.1350). Consistent with the Settlement Agreement, we revised the monitoring requirements for raw mills and finish mills to allow for the use of continuous monitoring systems in lieu of daily visible emission monitoring. Our direct final rule amendments correctly reflect these new options in §63.1350(m). However, we inadvertently omitted the new options from Table 1 to §63.1350 (Monitoring Requirements). Today's rule amendments correct Table 1 to include the continuous monitoring system

options for raw mills and finish mills.

Administrative Requirements

Under Executive Order 12866, Regulatory Planning and Review, (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is, therefore, not subject to review by the Office of Management and Budget. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, does not apply to this action. Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) or sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4). This rule also is not subject to Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, (62 FR 19885, April 23, 1997) because EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. This rule is not subject to

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use because it is not a significant regulatory action under Executive Order 12866. This rule does not have any federalism implications under Executive Order 13132, Federalism. The Paper Reduction Act and the National Technology Transfer and Advancement Act do not apply here. The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the Congressional Review Act if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement (5 U.S.C. 808(2)). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of [INSERT DATE OF PUBLICATION OF THIS FINAL RULE IN THE FEDERAL REGISTER]. The EPA will submit a report containing this rule and other required

information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

_____

Dated:

_____

Jeffrey R. Holmstead
Assistant Administrator
for Air and Radiation

For the reasons stated in the preamble, title 40, chapter 1, part 63 of the Code of Federal Regulations is amended as follows:

PART 63--[AMENDED]

1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

Subpart LLL--[AMENDED]

2. Table 1 to §63.1350, entitled "Monitoring Requirements," is amended by revising the entry for raw mills and finish mills at major sources/opacity to read as follows:

Table 1 to §63.1350. Monitoring Requirements.

Affected source/pollutant or opacity	**Monitor type/operation/process**	**Monitoring requirements**
* * * * *	* * * * *	* * * * *
Raw mills and finish mills at major sources/opacity	Method 22 visible emissions test. (This requirement does not apply to a raw mill or finish mill equipped with a continuous opacity monitor or bag leak detection system.)	Conduct daily 6-minute Method 22 visible emissions test while mill is operating at representative performance conditions; if visible emissions are observed, initiate corrective action within 1 hour and conduct follow up Method 22 test. If visible emissions are observed, conduct 30-minute Method 9 test.
	Continuous opacity monitor, if applicable	Install, operate, and maintain in accordance with general provisions and with PS-1. A six-minute average greater than 10% opacity is a violation.

	Bag leak detection system, if applicable	Install, operate, and maintain in accordance with §63.1350(m). Operate and maintain such that alarm is not activated and alarm condition does not exist for more than 5% of the total operating time in a 6-month period. If alarm sounds, initiate corrective action.
* * * * *	* * * * *	* * * * *

* * * * *